

**KERSTIN WALDO**  
Claimant

**CONAGRA FOODS**  
Self-Insured Respondent

The claimant requests review of this decision, alleging the ALJ erred in concluding she had failed to establish a permanent impairment as a result of her work-related accident. Claimant maintains she is entitled to a five percent whole body functional impairment based upon the testimony of Dr. Sergio Delgado. She further asserts she is entitled to an award requiring respondent to provide her with ongoing medications as well

as payment for the TENS unit recommended by Dr. Jeffrey T. MacMillan, the treating physician.

Respondent contends the ALJ was correct in his findings and that his award should be affirmed in all respects.

The only issues to be decided are the nature and extent of claimant's functional impairment,<sup>1</sup> and her entitlement to future medical benefits and payment for the ongoing medications and the TENS unit.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be modified.

Claimant sustained a compensable injury on November 12, 2002 when she slipped while picking meat up off the floor. Later that same day, while she was pushing a rack of meat to the cooler, her feet came out from under her and she again fell, this time to her knees.

As a result of these two accidents, claimant developed pain in her lower and middle back. Claimant was referred to Dr. Bryan Van Meter, an occupational health physician, who prescribed an anti-inflammatory and a muscle relaxer. Claimant was then placed on restrictions and sent back to work. She eventually began to see Dr. Dick Geis, who continued her conservative treatment. Then, on February 18, 2003, Dr. Geis determined claimant had met maximum medical improvement, and she was again released to work with restrictions.

In March of 2003, respondent sent claimant for an evaluation with Dr. Jeffrey T. MacMillan, an orthopaedic physician. Dr. MacMillan noted that claimant's complaints consisted of aching pain across the top of both shoulders, sharp stabbing pain radiating across her bra line and occasional aching or stabbing pain globally across her low back.<sup>2</sup> He continued her on the medications originally prescribed by Dr. Van Meter and recommended she undergo a MRI. He also prescribed a TENS unit for pain management.<sup>3</sup>

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<sup>1</sup> At oral argument claimant's counsel stipulated that only functional impairment was at issue, and that claimant was not asserting a work disability claim at this time.

<sup>2</sup> MacMillan Depo. at Cl. Ex. 2 at 12.

<sup>3</sup> *Id.* at 6-7, Cl. Ex. 2 at 13.

The MRI was performed on July 24, 2003, and revealed minimal degenerative disk changes at L1-2. Claimant's complaints of back pain continued with no improvement and she reported occasional use of the anti-inflammatory and muscle relaxer medications.

During the course of her treatment with Dr. MacMillan, he recommended she see a gynecologist as he suspected there might be another source for claimant's back complaints. Although she denies experiencing any sort of pelvic pain, claimant followed Dr. MacMillan's suggestion and consulted with Dr. Anwar K. Khoury who identified a cyst on one of her ovaries. The cyst was removed on August 15, 2003. Claimant testified that her back complaints continued even after this procedure. When deposed, Dr. MacMillan indicated that the cyst "could" be consistent with claimant's complaints of back pain as of July 2003.<sup>4</sup> Dr. MacMillan explained that sometimes it is difficult for the patient to discriminate the source of pain in the back. Thus, for example, a woman might not indicate her ovary hurts but rather, that her back hurts.<sup>5</sup> Put another way, "there is an endless list of non-spinal related sources of back pain and the brain can't distinguish between those sources."<sup>6</sup>

After a series of visits, Dr. MacMillan released her on July 29, 2003. At that time he imposed permanent light physical demand restrictions upon her work activities and issued a zero (0) percent permanent impairment rating pursuant to the *AMA Guides (Guides)*.<sup>7</sup> Respondent has accommodated these restrictions and claimant has returned to work.

In April 2003, claimant went to see Dr. Sergio Delgado at her attorney's request. Dr. Delgado reviewed claimant's previous medical records, including those involving an earlier work-related injury to her back in 2001. Dr. Delgado found claimant had objective findings in the mid-thoracic region, specifically spasms and guarding involving the parathoracic musculature.<sup>8</sup> Dr. Delgado confirmed that an injury to the mid back could produce radiating symptoms in the upper and lower areas of the back.<sup>9</sup> After this first visit Dr. Delgado recommended an additional diagnostic test to the mid-back. This test was not performed.

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<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 12.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

<sup>8</sup> Delgado Depo. at 6-7.

<sup>9</sup> MacMillan Depo. at 6.

On August 19, 2003, Dr. Delgado issued a second report based upon his original examination. At that time, he assessed a five percent permanent partial impairment to the whole body, concluding that she fell within the cervicothoracic category II based upon the *Guides*. Dr. Delgado explained that in order to find a patient is within category II, there must be radiating pain, a history of an injury, and objective findings of spasms and guarding.<sup>10</sup> He concluded that criteria had been met and as such, he opined she is properly categorized as a class II, which qualifies for the five percent functional impairment. In addition, Dr. Delgado testified that, based upon claimant's history and the medical records, the five percent he assessed was causally related to claimant's work-related injury.

The ALJ concluded that "the [c]laimant has either a 0 percent Class I impairment or a 5% Class II impairment."<sup>11</sup> He went on to state that "the Court has in vain sought to find a reason why one physician's opinion is more credible than the other."<sup>12</sup> After failing to find such a reason, the ALJ concluded claimant had failed to prove it is more likely than not that she has any permanent impairment. The Board disagrees.

Claimant has expressed consistent upper and low back complaints since the date of her compensable accident. Dr. MacMillan has taken the rather inconsistent position that claimant sustained no permanent impairment, but requires permanent work restrictions. This inconsistency calls into question the credibility of Dr. MacMillan's assessment on the issue of impairment.

The Board finds that claimant's true impairment lies somewhere in between the two evaluation assessments of the two physicians and concludes claimant bears a three percent functional impairment as a result of her work-related accident of November 12, 2002. Accordingly, the ALJ's finding of zero percent is hereby modified to reflect a three percent whole body functional impairment.

As for the claim for payment of the TENS unit, the Board reverses the ALJ's decision on this issue and finds that respondent should bear that cost. Dr. MacMillan, the treating physician designated by respondent, prescribed the TENS unit for pain management. Claimant testified that she continues to use the device 3-4 times per week.<sup>13</sup> Given this evidence, the Board finds no convincing reason for respondent to refuse to pay this expense.

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<sup>10</sup> Delgado at 8.

<sup>11</sup> ALJ Award (May 6, 2004) at 3.

<sup>12</sup> *Id.*

<sup>13</sup> R.H. Trans. at 14.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 6, 2004, is modified as follows:

The claimant is entitled to 12.45 weeks of permanent partial disability compensation at the rate of \$432 per week or \$5,378.40 for a 3% functional disability, making a total award of \$5,378.40.

As of October 25, 2004 there would be due and owing to the claimant permanent partial disability compensation at the rate of \$432 per week in the sum of \$5,378.40 for a total due and owing of \$5,378.40, which is ordered paid in one lump sum less amounts previously paid.

Claimant is also entitled to future medical including payment for the TENS unit. All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Mark E. Kolich, Attorney for Self-Insured Respondent  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director